Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

MICHAEL MALLOY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, a United States Capitol police officer, was enticed by a friend into having sexual relations with a young woman whom Petitioner believed was an adult. Both the woman and friend told Petitioner that she was a nineteen-year-old college student, when she was actually one month shy of her fifteenth birthday. While Petitioner and the woman engaged in relations, a videotape was made. The video was kept by Petitioner and was never copied or disseminated. Petitioner was charged under 18 U.S.C. § 2251(a) with using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction thereof. At trial, Petitioner was precluded from raising a reasonable mistake of age defense.

The question presented is whether the Free Speech Clause of the First Amendment requires that a defendant be permitted to present a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a).

PARTIES TO THE PROCEEDING

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Petitioner, Michael Malloy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals denying Petitioner's Petition for Rehearing and Rehearing en Banc (App. 42a) is unreported. The opinion of the court of appeals denying Petitioner's appeal (App. 1a-29a) is reported at 568 F.3d 166. The judgment of the district court (App. 30a-41a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing en banc was entered on August 4, 2009. This petition was filed within 90 days of entry of judgment. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 2251(a) of Title 18 of the United States Code is reproduced in the appendix to this petition. App. 43a-46a.

STATEMENT OF THE CASE

In December 2006, Petitioner was charged with one count of sexual exploitation of a minor for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a) in the United States District Court for the District of Maryland. App. 3a. Section 2251, which prohibits the sexual exploitation of children, provides in pertinent part:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (e) ... if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means.

In the fall of 2005, Petitioner Michael Malloy, a United States Capitol Police Officer, had consensual sexual relations with S.G., a young woman whom he believed to be a 19-year-old Bowie State University student. (JA 296-97).[1] A friend, Aaron Burroughs, had introduced Mr. Malloy to S.G., and had brought her to Mr. Malloy's home. (JA 197). On two occasions, S.G. engaged in oral and vaginal sex with the two men. (JA 198-200). As Mr. Malloy later found out, S.G. was not

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[1] All "JA" references refer to the Joint Appendix filed with Petitioner's appeal in the Fourth Circuit on March 25, 2009.

a college student, but rather was an under-aged prostitute Burroughs had been introducing to friends and others at that time. (JA 205, 207-08). Mr. Malloy attempted to establish a reasonable mistake of age defense, but was prohibited from doing so. (JA 16, 93, 107-12).

The Government filed a pretrial motion in limine to preclude the defendant from arguing or introducing evidence that he lacked knowledge that the victim was a minor. (JA 4). At a pretrial hearing on the matter, the Government argued that knowledge of the age or knowledge of the fact that the victim was a minor was not an element of sexual exploitation of a minor under Section 2251. (JA 84). The Government further contended that mistake of age was not available as an affirmative defense to the crime. (JA 84-85). Finally, the Government argued that the First Amendment did not require a "judicially created reasonable mistake-of-age defense." (JA 91).

Trial counsel for Mr. Malloy countered that "we absolutely intend to present a mistake-of-age defense." (JA 93). The district court heard lengthy arguments on the point, ultimately ruling that the defense was not available. (JA 107-12). Analogizing the offense at hand to statutory rape, the court granted the Government's motion in limine, stating that the mistake-of-fact defense in such cases was "the exception rather than the rule." (JA 108). The district judge went on to comment that there was no affirmative defense "normally associated with this statute." (JA 110).

According to her birth certificate, identification card, and testimony, S.G. was born on November 9, 1990. (JA 186, 404, 486). In the fall of 2005, S.G. was starting the tenth grade at Bowie High School. (JA 196). At that time, she was a manager for the school's football team. (JA 197). Aaron Burroughs was the coach. (*Id.*). S.G. "became involved" with Burroughs outside of school during that time. (JA 197).

According to S.G., in mid-October of 2005, Burroughs took S.G. to Mr. Malloy's house. (JA 197). After the three talked for a while, S.G. engaged in oral and vaginal sex with both Burroughs and Mr. Malloy. (JA 198-99). The two men took turns videotaping the other's sexual activities with S.G. (JA 199). S.G. went back to Mr. Malloy's house in late November 2005 and again engaged in sexual activities with Mr. Malloy and Burroughs. (JA 199-200). S.G. was not certain whether those activities were videotaped. (JA 200).

S.G. further testified that she had known Burroughs since her freshman year in high school, had become sexually active with him, and had started prostituting for him in the fall of 2005. (JA 205). S.G. admitted that she and Burroughs had a "plan" whereby she would tell anyone she had sex with that she was "19 years-old and attending Bowie State." (JA 207). S.G. further admitted that she heard Burroughs tell people on numerous occasions that she was "19 and attending Bowie State." (JA 208). Finally, S.G. testified that she posted a reference to pledging AKA, a sorority at Bowie State, in an on-line diary. (JA 220-21, 494).

Mr. Malloy testified in his own defense. (JA 287). A 15-year veteran of the United States Capitol Police, he had a top secret clearance and had worked with the Dignitary Protection Unit. (JA 288-89). He first got to know Aaron Burroughs in 1984, when the two were in the seventh grade. (JA 293). The two men had on again and off again contact over the ensuing two decades. (JA 293).

According to Petitioner, in November or December of 2005, Mr. Malloy first met S.G. through the auspices of Burroughs. (JA 293). That first meeting occurred at the Fairchild Building on Capitol Hill, in Washington, D.C. (JA 294). S.G. told Mr. Malloy that she was 19 years old and was a sophomore at Bowie State University. (JA 296-97). Mr. Malloy told S.G. that his brother had graduated from Bowie State and the two discussed the college. (JA 297-98). On two later occasions, Mr. Malloy had sex with S.G. (JA 298).

The activity between Mr. Malloy and S.G. and Burroughs came to the attention of Special Agent William McDermott of the FBI in the summer of 2006. (JA 247). After interviewing S.G. and Burroughs on July 31, 2006, McDermott visited Mr. Malloy at his place of employment on August 1, 2006. (JA 256). Mr. Malloy voluntarily told McDermott that he had sex with S.G. (JA 257-58). McDermott told Mr. Malloy that S.G. was a juvenile; and, Mr. Malloy told McDermott that he was told she was 19 and a student at Bowie State University. (JA 262-64). McDermott further testified that Mr. Malloy had asked about S.G.'s age because she "appeared young." (JA 275).

The parties stipulated that the video recording recovered from Mr. Malloy's home depicted Mr. Malloy "engaging in genital and oral sexual intercourse with S.G." (JA 403). The stipulation further provided that this exhibit proved "beyond a reasonable doubt that the defendant used S.G. to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." (JA 403). To establish that the video recording was produced using materials that had been transported in interstate or foreign commerce, the Government called a witness from Sony Electronics. (JA 169). Michael Hogan testified that the camcorder was manufactured in Japan and that the videotape was manufactured in Mexico. (JA 170). At the end of the case, defense counsel made a motion for judgment of acquittal on the ground that the indictment had been constructively amended. (JA 321-29). The district judge denied the motion. (JA 330-31). The jury found Mr. Malloy guilty on the one count submitted to it. (JA 396).

The district judge held a sentencing hearing on January 9, 2008. (JA 405). Defense counsel argued that the imposition of a 15-year mandatory minimum sentence constituted cruel and unusual punishment under the Eighth Amendment. (JA 432-41). Noting that Congress mandated that Mr. Malloy had to serve at least 15 years and that Fourth Circuit precedent did not permit the finding of an Eighth Amendment violation, the district judge sentenced Mr. Malloy to 180 months. (JA 459-61). The court noted, however, that it would have given a lower sentence if it were permitted by law. (JA 460).

Petitioner noted an appeal from this judgment on January 9, 2008. On May 28, 2009, the Fourth Circuit affirmed Petitioner's conviction. App. 27a. Petitioner filed a timely petition for rehearing and for rehearing en banc, which was denied on August 4, 2009. App. 43a.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit ruled that a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a) was not constitutionally required. That holding is incorrect and warrants this Court's review. Moreover, the lower courts are in conflict as to whether a reasonable mistake of age defense is available to a charge under the statute. Based on the information provided to him by S.G. and Petitioner's friend, Petitioner believed that he had made a legal videotape of himself having sex with a consenting adult. The First Amendment requires that a reasonable mistake of age defense be available as a defense to a charge under 18 U.S.C. § 2251(a). To hold otherwise would have a chilling effect on protected speech and could subject a defendant to strict liability based primarily on how accomplished a minor is at deception.

I. The Lower Courts Are in Conflict on Whether to Recognize a Reasonable Mistake of Age Defense to a Charge Under 18 U.S.C. § 2251(a).

There is a split among the Circuits as to whether to recognize a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a). In

United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that the First Amendment required that a reasonable mistake of age defense be available to this charge. However, in interpreting a different section of the same statute regarding the same act(s) described in § 2251(a), but taking place outside of the United States, the Eleventh Circuit held the opposite, that a mistake of age defense is not required in prosecutions brought under Section 2251(c)(2). *See United States v. Deverso*, 518 F.3d 1250, 1257 (11th Cir. 2008) (citing cases); *cf. Gilmour v. Rogerson*, 117 F.3d 368, 370-73 (8th Cir. 1997) (considering on habeas review Iowa statute similar to Section 2251(a)).

Likewise, State court decisions construing statutes analogous to Section 2251(a) are in conflict regarding whether a reasonable mistake of age defense is available to a charge under such statutes. Similar to the Ninth Circuit, the Court of Appeals of Maryland has likewise engrafted a reasonable mistake of age defense to a state statute prohibiting the photographing of a minor engaged in sexually explicit conduct. *See Outmezguine v. State*, 641 A.2d 870, 883-85 (Md. 1994) (although scienter was not an element, a defendant could raise a mistake of age defense). The Maryland court noted that in 25 other states and the District of Columbia, "similar statutes proscribing child pornography require the prosecution to prove scienter or allow a mistake of age defense," and that "only three states expressly preclude a defense of mistake of age." *Id.* at 883-84. In Outmezguine's case, which involved the photographing of a 15-year-old girl in sexually explicit poses, the defendant did not generate the issue of reasonable mistake of age

because he simply asserted that he "did not know how old she was." *Id.* at 886.

In Mr. Malloy's case, however, the issue was clearly generated and the defense should have been permitted under the above authority. Before and throughout his trial, Mr. Malloy asserted that he was told by S.G. and Burroughs that S.G. was a 19-year-old college student. (JA 16, 93, 262-64, 296-97). Even the subject of the sexually explicit video, S.G., admitted her scheme to make people believe that she was 19 and a college student. (JA 207-08). A person's appearance and demeanor may belie her true chronological age, particularly insofar as a 15-year-old girl is involved. This is common knowledge and the photographs of S.G. proffered below bear this out. (JA 487-89, 496).

In sum, a mistake of age defense is constitutionally compelled and should have been available to Mr. Malloy. To recognize such a defense, however, does not guarantee an acquittal. A defendant would still have to show that his actions were reasonable and not the result of carelessness or negligence. At the very least, however, Mr. Malloy should have been given the opportunity to make such a showing. The current division in the lower courts on this point illustrates the necessity of this Court's resolution of the matter.

II. The First Amendment Requires That a Reasonable Mistake of Age Defense Be Available as a Defense to a Charge Under 18 U.S.C. § 2251(a).

The Court of Appeals for the Ninth Circuit has ruled that a reasonable mistake of age defense is constitutionally required in cases under Section 2251(a). In *United States District Court*, 858 F.2d 534, 540-44 (9th Cir. 1988), the court ruled that notwithstanding the fact that the defendant's awareness of the subject's minority was not an element of the offense, the First Amendment required that a reasonable mistake of age defense be available.

In the Ninth Circuit case, 16-year-old Traci Lords was hired to perform in sexually explicit films. *Id.* at 536. Lords and her agent "perpetrated a massive fraud on what is euphemistically called the adult entertainment industry" as "Lords successfully passed herself off as an adult." *Id.* Because knowledge of the minor's age was not an element of the offense under Section 2251(a), the Government argued that "good-faith mistake could not be a defense." *Id.* Speaking through Judge Kozinski, the court rejected the Government's argument.

The court reasoned that the statute regulates speech, albeit speech that is not protected under the First Amendment. *Id.* at 538. (citing *New York v. Ferber*, 458 U.S. 747, 762 (1982)). Nonetheless, in regulating unprotected speech, care must be taken such that **protected** speech is not chilled. Because the film in which Traci Lords appeared (*Those Young Girls*) was not obscene, it would have been protected

under the First Amendment if not for its depiction of a minor. 858 F.2d at 538. Thus, the subject's age "defines the boundary between speech that is constitutionally protected and speech that is not." *Id.* at 538-39. The Ninth Circuit saw the issue as "whether Congress may subject a defendant to strict liability for misjudging the precise location of that boundary." *Id.* at 539.

After analyzing the relevant Supreme Court decisions, Judge Kozinski concluded "that the first amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech." *Id.* at 540. The Ninth Circuit relied particularly on *Smith v. California*, 361 U.S. 147 (1959), where the Court struck down a law imposing "criminal liability on a bookseller for possession of an obscene book." 858 F.2d at 539. In *Smith*, the Supreme Court noted that the legal doctrine of strict liability, although otherwise constitutional, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." 361 U.S. at 151. Distilling a series of Supreme Court cases, Judge Kozinski concluded that "a speaker may not be put at complete peril in distinguishing between protected and unprotected speech." 858 F.2d at 539.

This, of course, is exactly the effect of Section 2251(a), unless a defendant is allowed "to present a reasonable mistake of age defense." *Id.* The Ninth Circuit concluded:

We are convinced that if put to a choice

> between a statute that punishes severely the use of minors in sexually explicit materials, subject to a reasonable mistake of age defense, and no such statute at all, Congress would choose the former. Under the circumstances, we conclude that section 2251(a) is susceptible to the type of narrowing construction that would save it from fatal collision with the first amendment.

858 F.2d at 543.

Save a cursory discussion in passing in a footnote in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.5 (1994), this Court has never directly examined this issue. Given the intervening decisions in the Ninth and Eleventh Circuits and given the confusion among the lower courts, it is particularly crucial to resolve this issue.

Although Congress did not specifically provide for a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a), if this Court determines that such a defense is constitutionally required, the Court may engraft the defense as a matter of decisional law, as the Ninth Circuit did. Moreover, this Court has recognized that Congress enacts criminal laws "against the background of Anglo-Saxon common law." *See United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). It follows that, even when Congress does not specifically provide for a common law defense, a defendant can nonetheless rely on it. *See United States v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007). As the Fourth Circuit noted in *Mooney*,

interpreting *Bailey*:

> The proper conclusion from *Bailey* is that Congress' failure to provide specifically for a common law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating the statute from relying on such a defense." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir.1982). This conclusion is not surprising, however, inasmuch as statutes rarely enumerate the defenses to the crimes they describe, and defenses continue to remain doctrines of the common law, the background against which Congress enacts federal crimes.

497 F.3d at 403. Thus, the fact that Congress did not expressly provide for a reasonable mistake of age defense in § 2251(a) does not preclude such a defense from being raised.

III. The Question Presented Is Important.

As the Ninth Circuit noted in *United States District Court*, despite our feelings toward the subject matter, the rights protected under the First Amendment are inviolate and the duty of this Court to protect those rights is nonetheless invoked:

> [T]he first amendment interest we are protecting, the right to produce salacious movies-is intrinsically unworthy of much

> solicitude. Nevertheless, the first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution. See, e.g., *Cohen v. California*, 403 U.S. 15, 24-26, 91 S.Ct. 1780, 1787-89, 29 L.Ed.2d 284 (1971) (vulgar expression displayed in public courthouse); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49, 89 S.Ct. 1827, 1830-31, 23 L.Ed.2d 430 (1969) (per curiam) (Ku Klux Klan cross-burning); *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir.) (neo-Nazi march through Jewish neighborhood), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978).

United States District Court, 858 F.2d at 541.

Moreover, if a defendant is not permitted to raise a reasonable mistake of age defense to a charge under the statute, the sweep of the statute will be far broader than Congress ever intended. Petitioner reasonably believed that he was having a consensual interaction with an adult and that, similar to a consenting married couple choosing to videotape their sexual interaction for their private use and enjoyment, no law prohibited Petitioner from videotaping this encounter with the consent and cooperation of the

woman involved. Petitioner was affirmatively misled by his friend and S.G. and was subject to fifteen years imprisonment because he believed them.

Without a reasonable mistake of age defense, any individual who has no inclination or interest in producing or consuming child pornography is subject to serious criminal liability based solely on his or her good faith belief in an efficacious lie, i.e., the age of a young woman, rather than criminal intent. An individual's liberty could hinge on how effectively he was deceived. To be sure, Petitioner was not the intended target of this statute. However, without a reasonable mistake of age defense, the liberty and First Amendment rights of those who are guilty of nothing more than being deceived are vulnerable to the whim of any young person who takes it upon herself to tell a convincing lie.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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October, 2009

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 08-4136

v.

MICHAEL MALLOY,
Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (8:06-cr-00574-AW-1)

Argued: March 25, 2009

Decided: May 28, 2009

Before DUNCAN, Circuit Judge, Robert J. CONRAD, Jr., Chief United States District Judge for the Western District of North Carolina, sitting by designation, and Thomas D. SCHROEDER, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Conrad and Judge Schroeder joined.

COUNSEL

ARGUED: Gary Eugene Bair, Bennett & Bair, LLC, Greenbelt, Maryland, for Appellant. Michael Joseph Leotta, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. ON BRIEF: Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, Michele W. Sartori, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

OPINION

DUNCAN, Circuit Judge:

Appellant Michael Malloy challenges his conviction and sentence under 18 U.S.C. § 2251(a) for producing a videotape of himself and another adult having sex with a 14 year-old girl ("S.G."). Among other issues, Malloy contends that the statute is constitutionally infirm unless we interpret it to incorporate a reasonable mistake of age defense. For the reasons that follow, we affirm Malloy's conviction and sentence.

I.

In October 2005, Malloy's friend, Aaron Burroughs, brought S.G. to Malloy's home for the purpose of engaging in sex with the two men. Petr.'s Br. at 4; J.A. 197-98. Burroughs coached a junior varsity high school football team of which S.G. was the manager. Malloy was a 33 year-old United States Capital [sic] Police Officer. At the time, S.G. was a 14

year-old girl, born on November 6, 1990, who had recently started tenth grade. Burroughs and Malloy videotaped each other having sex with S.G. Later in the fall of 2005, Burroughs again brought S.G. to Malloy's home to engage in sex with the two men. On this second occasion, S.G. was either 14 or had just turned 15 years of age.

The FBI began investigating in the summer of 2006. After speaking with S.G. and Burroughs, FBI agents interviewed Malloy and also executed a search warrant at his residence. Malloy admitted to the agents that he had sex with S.G. on two occasions and had videotaped one encounter with his Sony camcorder. Malloy also admitted that he thought S.G. "looked young" when he first met her. J.A. 60, 266, 275. Other than asking her how old she was, however, he did not further investigate S.G.'s age. At Malloy's residence, FBI agents recovered the Sony camcorder and the videotape of the sexual encounter.

Malloy was charged with sexual exploitation of a minor for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a). This charge contains three essential elements: (1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce.

Malloy filed pretrial motions, including a motion to dismiss the indictment as exceeding Congress's

power under the Commerce Clause. The Government filed a motion in limine to preclude Malloy from offering a defense of reasonable mistake of age. At a pretrial motions hearing on September 11, 2007, the district court denied Malloy's motions. The court held that under Supreme Court and Fourth Circuit precedent, "the commerce clause does empower Congress to regulate purely local intrastate activities... so long as they are part of an economic class of activities that have a substantial effect on interstate commerce." J.A. 82. The court granted the government's motion to disallow a mistake of age defense, reasoning that

> this statute is very, very similar to statutory rape kinds of cases. Most jurisdictions in this country simply will not allow reasonable mistake-of-fact defenses for these type[s] of crimes for the reasons that the legislature made it a crime and they proscribed this when you're dealing with minors to protect minors. And so ... if she's under 18, she was the type of person that Congress intended to protect.[1]

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[1] The district court carefully and repeatedly considered Malloy's reasonable mistake of age defense. After initially granting the government's motion to preclude the defense, for example, the court allowed Malloy's counsel to "proffer the circumstances that reflects [sic] high care, high standard, almost a faultless situation where there's no way that your client was able to determine that she was under 18." J.A. 110. After hearing the evidence counsel proposed, the court refused to reverse its earlier ruling because "[t]here was no proffer that the defendant, Mr. Malloy, investigated her age or saw any documents that she provided that

J.A. 111.

At trial, Malloy stipulated that the videotape at issue was "a visual depiction showing the defendant engaging in genital and oral sexual intercourse with S.G.," and that it "proves beyond a reasonable doubt that the defendant used S.G. to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." J.A. 185, 403. The government established that S.G. was born in November 1990 through S.G.'s testimony and through a certified true copy of her birth certificate. She was therefore 14 years old when Malloy videotaped her having sex with him in October 2005. The government

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showed that she was over 18." J.A. 154.

Moreover, Malloy's counsel was allowed to present much of the evidence that would have supported a reasonable mistake of age defense in the context of a challenge to the government's proof on the essential element of the victim's actual age. The court allowed counsel to ask S.G. such questions as what Burroughs instructed her to tell anyone who asked about her age; whether she told the defendant her age; and whether she posted misleading information about her age on the internet. Further, Malloy repeatedly attacked the victim's credibility by impeaching her with her allegedly prior inconsistent statements regarding her age. The court allowed Malloy to testify that he was told that the victim was a 19 year-old college student who had just entered her sophomore year at Bowie State. The court admitted such evidence despite subsequently concluding that it "had very little relevance at all and it got very close to the prohibition that the court gave from the inception , that reasonable mistake of age just isn't a defense under these facts." J.A. 337. Indeed, the court commented that "[i]n retrospect I probably shouldn't have allowed any of it because it really is not relevant. The defense really just had speculation." J.A. 338.

also produced uncontested evidence that the Sony video camera Malloy used was manufactured in Japan and that the videotape cassette at issue was manufactured in Mexico.

At the close of the government's evidence, Malloy moved for a judgment of acquittal. He argued that there had been an impermissible constructive amendment to the indictment because it incorrectly required that the prohibited act be done "knowingly." J.A. 321. The court denied the motion, ruling that the term "knowingly" in the indictment was merely "superfluous" and that no constructive amendment had occurred. J.A. 328, 330-31. On September 20, 2007, the jury returned a verdict of guilty.

Although Malloy's advisory sentencing guidelines range was 324 to 360 months, the court sentenced him to the statutory mandatory minimum of 15 years (180 months). In doing so, the court rejected Malloy's argument that the mandatory minimum was grossly disproportionate to the crime committed in violation of the Eighth Amendment. This appeal followed.

Malloy presents four issues on appeal: (1) that the district court erred by refusing to allow a reasonable mistake of age defense; (2) that that [sic] there was a constructive amendment to the indictment under which he was charged; (3) that § 2251(a) as applied to him was not a valid exercise of Congress's Commerce Clause power; and (4) that his 15-year mandatory minimum sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. We consider each in turn.

II.

A.

Malloy first argues that a mistake of age defense is constitutionally required. Malloy maintains that without such a defense § 2251(a) is unconstitutionally overbroad under the First Amendment because it chills a substantial amount of protected speech. This court reviews a challenge to the constitutionality of a federal statute de novo. *United States v. Buculei*, 262 F.3d 322, 327 (4th Cir. 2001).

To comprehensively address Malloy's challenge, we conduct a sequential analysis. We focus first on the statute itself. In doing so, we find that the statutory text, legislative history, and judicial interpretation compel the conclusion that knowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense. Informed by this statutory analysis, we then turn to the crux of Malloy's argument: that in order for the statute to avoid unconstitutional overbreadth we must engraft onto it a reasonable mistake of age defense.

1.

We begin with an analysis of the statute, which provide in pertinent part:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in .... any sexually explicit conduct for the purpose of producing any visual depiction of such

> conduct . . . shall be punished ... if that visual depiction was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means.... 18 U.S.C. § 2251(a).

It is immediately apparent that the statute on its face contains no requirement that the defendant know that the victim is a minor.

In fact, Congress considered and explicitly rejected such a knowledge requirement. The House Conference Report clarified:

> The Senate Bill contains an express requirement in proposed section 2251(a) that the crime be committed 'knowingly.' The House amendment does not. The Conference substitute accepts the House provision *with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.*

H.R. Rep. No. 95-811, at 5 (1977) (Conf. Rep) (emphasis added); *see also*; S. Rep. No. 95-601, at 5 (1977).

The Supreme Court, too, has opined that knowledge of the age of the victim is not required to convict a defendant under § 2251(a). In *United States v. X-Citement Video, Inc.*, the Supreme Court considered the interpretation of § 2252, which prohibits the transportation, shipping, reception, or

distribution of pornography produced using underage individual. 513 U.S. 64, 68 (1994). The Court informed its analysis of § 2252 through a comparison with § 2251(a). The Court explained that when Congress amended the two statutes in 1977, "the new bill retained the adverb 'knowingly' in § 2252 while simultaneously deleting the word 'knowingly' from § 2251(a)." *Id.* at 77. The Court reasoned that the difference in congressional intent with respect to the statute prohibiting the dissemination or receipt of child pornography, on the one hand (i.e., § 2252), and the production of child pornography, on the other (i.e. § 2251(a)), "reflects the reality that producers are more conveniently able to ascertain the age of performers. It thus makes sense to impose the risk of error on producers" of child pornography. *Id.* at 77 n.5.

Like the district court here, the Supreme Court drew an analogy between § 2251(a) and traditional statutory rape offenses, stating that the presumption of a mens rea requirement in criminal law "expressly excepted sex offenses, such as [statutory] rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached [the] age of consent." 513 U.S. at 72 n.2 (citation and quotations omitted). The Court stated that under § 2251(a), just like under traditional statutory rape laws where mistake of age is not a defense, "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age." 513 U.S. at 72 n.2. The Court also noted that the "opportunity for reasonable mistake as to age" is extremely low in cases where the defendant comes into direct contact with the victim and she is available for questioning. *Id.* "[P]roducers

may be convicted under § 2251(a) without proof they had knowledge of age." *Id.* at 77 n.5. A defendant's awareness of the victim's minority is not an element of the offense.

Further, the text of § 2251(a) does not include an affirmative defense for reasonable mistake of age. Evidence of Malloy's belief regarding S.G.'s age is irrelevant under the statute, where it is the actual age of the victim that controls. When Congress intends a statute to include an affirmative defense, particularly in the context of the laws involving child pornography and sexual exploitation of children, it can and has included the defense in the statute's text. *See e.g.*, 18 U.S.C. § 2243(c) (establishing a reasonable mistake of age defense to a charge of sexual abuse of a minor in a prison or institution, or in the special maritime or territorial jurisdiction of the United States); 18 U.S.C. § 2252A(d) (allowing an affirmative defense to possession of child pornography charge if the defendant possessed less than three images and took steps to destroy or report them). It has not done so here.

2.

We now turn to a consideration of Malloy's constitutional challenge. Apparently recognizing that the statutory text provides no grounds for raising a reasonable mistake of age defense, Malloy contends that one must be judicially engrafted for the statute to avoid reaching too broadly and chilling a substantial amount of protected speech.

We first consider Malloy's argument in light of

the rulings of our sister circuits that have addressed whether a reasonable mistake of age defense is constitutionally necessary for statutes that prohibit the production of child pornography to avoid unconstitutional overbreadth. We then turn to Supreme Court guidance to analyze Malloy's overbreadth argument. Informed by this analysis, we conclude that no reasonable mistake of age defense is constitutionally required.

a.

Malloy's argument mirrors, and relies heavily upon, a Ninth Circuit decision, *United States v. United States District Court ("District Court")*, 858 F.2d 534 (9th Cir. 1988), which pre-dates the Supreme Court's pronouncements in *X-Citement Video*. A divided panel in *District Court* held that, although § 2251(a) does not provide for a mistake of age defense, the First Amendment requires reading one in. The majority noted that "we must be careful to ensure that, in regulating unprotected speech [here, child pornography], Congress does not also chill speech that is protected [here, adult pornography]." 858 F.3d [sic] at 538. Without a reasonable mistake of age defense, the majority reasoned, producers of adult pornography "will almost certainly be deterred from producing such materials depicting youthful-looking adults actors; such actors may have considerable difficulty in finding producers willing to cast them; [and] audiences wishing to view films featuring such actors would be denied the opportunity." *Id.* at 540. Since this exclusion would, according to the majority, "seriously chill protected speech," *id.*, they engrafted a mistake of age defense, concluding that "Congress would prefer

section 2251(a) with a reasonable mistake of age defense to no statute at all."[2] *Id.* at 542.

The Eighth and Eleventh Circuits have ruled to the contrary, holding that no mistake of age defense is necessary in statutes prohibiting the production of child pornography. In *Gilmour v. Rogerson*, the Eighth Circuit held that the Constitution does not require a mistake of age defense under a state statute, Iowa Code § 728.12(1),[3] that is very similar to § 2251. 117

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[2] The majority noted that the defense was very narrow: "A defendant may avoid conviction only by showing, by clear an convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Id.* at 543. As such, it does not appear that *District Court* helps Malloy. Beyond asking S.G. her age, he did not conduct any investigation or view any documentary evidence. As the district court here suggested, it is unlikely that such cursory questioning would meet the "clear and convincing evidence" standard. Implicitly acknowledging these evidentiary deficiencies, at oral argument Malloy's counsel requested that this court engraft the reasonable mistake of age defense with a *lower* "preponderance of the evidence" standard. However, for the reasons that follow, we rejected the argument that § 2251(a) requires any affirmative defense.

[3] Iowa Code § 728.12(1), titled "Sexual Exploitation of a Minor," provides:

> It shall be unlawful to employ, use, persuade, induce, entice, coerce, solicit, knowingly permit, or otherwise cause or attempt to cause a minor to engage in a prohibited sexual act or the simulation of a prohibited sexual act. A person must know, or have reason to know, or intend that the act or simulated act may be photographed, filmed, or otherwise preserved in a negative, slide,

F.3d 368, 373 (8th Cir. 1997), *cert, denied* 522 U.S. 1122 (1998). There, Gilmour took sexually explicit photographs of a 17 year-old girl. On more compelling facts than those presented here, Gilmour had met the girl in a bar, was told by the girl's boyfriend that she was 22, and also claimed to have verified her age by viewing her driver's license. Like Malloy, Gilmour argued that the First Amendment required that he be allowed to assert a reasonable mistake of age defense as an affirmative defense to his prosecution. *Gilmour*, 117 F.3d at 372-73. The Eighth Circuit rejected that argument, holding that the state statute did not provide a reasonable mistake of age defense and was constitutional without one. The court clarified that under "criminal statues that protect children from sexual predators... the child's age is a long-established exception to the general rule that proof of *mens rea* is required; 'the victim's actual age [is] determined despite defendant's reasonable belief that the girl had reached the age of consent.'" *Id.* at 370 (citing *Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952)). In doing so, the Eighth Circuit compared the state statute with § 2251(a) and explicitly considered–and rejected- the Ninth Circuit's analysis in *District Court*. 117 F.3d at 372.

In *United States v. Deverso*, the Eighth Circuit likewise held that no affirmative defense was constitutionally required under another provision of

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> book, magazine, computer, computer disk, or other print or visual medium. . . or in any other type of storage system." [sic]

Iowa code § 728.12(1); *see Gilmour*, 117 F.3d at 370.

the same statute at issue here. 518 F.3d 1250 (11th Cir. 2008). Deverso was charged with, among other things, employing a minor to engage in sexually explicit conduct outside the United States "for the purpose of producing [a] visual depiction of such conduct" and transporting the visual depiction into the United States in violation of 18 U.S.C. § 2251(c)(1) &(2). *Id.* at 1252, 1257. Deverso contended that he was entitled to a mistake of age defense. The Eleventh Circuit found that knowledge of age is not an element of the offense and "that the Constitution does not mandate a mistake of age defense under § 2251." *Id.* at 1258. Like the Eighth Circuit in *Gilmour*, the Eleventh Circuit explicitly rejected the Ninth Circuit's holding in *District Court*. *Id.* at 1257-58.

b.

We turn now to an analysis of the statute under the overbreadth doctrine, on which Malloy's First Amendment challenge depends. The Supreme Court has held that "[a]ccording to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs." *United States v. Williams*, 128 S.Ct. 1830, 1838 (2008). The government interest in prohibiting criminal conduct must be weighed against the danger of chilling constitutionally protected speech. *Id.* "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.*; *see also New York v. Ferber*, 458 U.S. 747, 771 (1982) (holding that a

statute "should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications"). The Supreme Court has held that facial challenges based on the overbreadth doctrine "are especially to be discouraged." *Sabri v. United States*, 541 U.S. 600, 609 (2004).

In *Ferber*, the Supreme Court comprehensively considered child pornography in the context of an overbreadth challenge under the First Amendment. In weighing the government's interest as required by the overbreadth analysis, the Court found that "the exploitive use of children in the production of pornography has become a serious national problem" and that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 749, 757 (citations omitted). The Court cited a study showing that "sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults," *id.* at 758 n.9 (citation omitted), as well as other research chronicling the destructive effects of child pornography, *id.* at 758-60 nn.9 & 10. The government has a compelling interest in protecting even children who lie about their age. As the Eighth Circuit notes, "the State may legitimately protect children from self-destructive decisions reflecting the youthful poor judgment that makes them, in the eyes of the law, 'beneath the age of consent.'"[4] *Gilmour*, 117 F.3d at 372.

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[4] Similarly, the dissenting judge in *District Court* reasoned that

Because of the surpassing importance of the government's interest in safeguarding the physical and psychological well-being of children,[5] the government has greater leeway to regulate child pornography than it does other areas. *See Ferber*, 458 F. 3d [sic] at 756 ("Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy....[H]owever, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.").

Having considered the strong government interest identified by the Supreme Court in suppressing the production of child pornography, we

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> Congress intended to protect children... who try to pass as adults to appear in pornography. Such children are in grave danger of sacrificing their physiological, emotional, and mental health. . . . These children are inexperienced and uneducated; most important, they lack the foresight we attribute only to adults. Congress has chosen to protect such children against their own immaturity, against the unreasoned, desperate choices children are wont to make.

858 F.3d at 544 (Beezer, J., dissenting).

[5] In arguing that the government's interest in preventing child pornography is of overriding importance, the Supreme Court has maintained that such regulation is critical because "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, 548 F.3d [sic] at 757 (quotation and citation omitted).

now assess whether § 2251(a) as written poses a threat of chilling a substantial amount of protected expressive activity. The protected expression the Ninth Circuit found to be threatened by the statute was the production of adult pornography. Malloy's argument echoes the Ninth Circuit's analysis. *See* Petr.'s Br. at 14. We are persuaded by neither.

We note as a practical matter that little legitimate pornography would be chilled because producers of pornography are *already* required to authenticate actors' ages.[6] *See* 18 U.S.C. § 2257(b)(1) (requiring that anyone who produces pornography shall "ascertain, by examination of an identification document containing such information, the performer's name and date of birth"). There are, moreover, other reasons why § 2251(a) does not pose s substantial risk of chilling protected expression. First, only a subset of adult pornography is at issue— namely, pornography made by producers who seek to use "youthful-looking" actors or actresses. Second, because the children depicted in child pornography frequently cannot be found, the prosecutor must show that the subject is a minor solely from the pictures. Consequently, most prosecutions for child pornography involve a subject

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[6] While it is certainly true, as the majority in *District Court* notes, that documents can be forged, *District Court*, 858 F.3d at 540, the originals exist somewhere (e.g., original birth certificates exist at the hospital of birth, etc.) and the producer of pornography, because he has direct contact with the subject, has access to the original documents, *see id.* at 546 (Beezer, J., dissenting). If the originals do not exist, the government would have a very difficult time proving beyond a reasonable doubt that the actor or actress is a minor (unless he or she is unmistakably a child, *see infra* note 9 and accompanying text).

that is not simply "youthful-looking" but unmistakably a child.[7] H.R. Rep. No. 98-536, at 3, 7-8 (1984). Statutes like § 2251(a) will not inhibit producers of adult pornography from using youthful-looking subjects who are not unmistakably children because prosecution in such cases is rare. *See District Court*, 858 F.2d. at 546 (Beezer, J. dissenting). And finally, producers of adult pornography who wish to use youthful-looking subjects will not be deterred by § 2251(a) for profit reasons: pornography is lucrative.[8] High demand creates powerful incentives that will not

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[7] It was precisely this problem that prompted Congress to raise the age of minority for the purpose of §§ 2251 & 2252 from 16 to 18 years. H.R. Rep. No. 98-536, at 3,7-8. As the Committee Report explains, the amendment "changes the definition of minors protected by this chapter from a person under the age of 16 years, to a person under the age 18 years. . . . Usually the child who is depicted in child pornography cannot be located. Proof of the child's age has therefore been by circumstantial evidence.... By raising the age to 18, if the child depicted does not look like an adult, a conviction can be obtained." *Id.* The report added, "[r]aising the age... would facilitate the prosecution of child pornography cases and raise the effective age of protection of children from these practices, probably not to 18 years of age but perhaps to 16." *Id.* at 3.

[8] *See, e.g.*, BETH BARRETT, *Porn is $12 Billion Industry, but Profits Leave Valley*, DAILY NEWS, June 5, 2007 (explaining that, in 2006, pornography was a $12 billion industry and that it had quadrupled from 1991 to 2006); *Porn Profits: Corporate America's Secret*, ABCNEWS.COM, Jan. 28, 2003 *available at* http://abcnews.go.com/Primetime/Story?id=132001&page=1 (last accessed on April 6, 2009) (explaining that, in 2002, pornography was a $10 billion industry—bigger than the NFL, the NBA, and Major League Baseball combined—and that some of the nation's best-known corporations are quietly sharing in its significant growth and profits).

be inhibited by a slim chance of prosecution. Given the superior ability of a producer to ascertain the age of the subject—through visual contact, documentary verification, direct questioning, and reputational information—and the substantial profit that exists in producing adult pornography, we think it unlikely that producers of such pornography will be chilled, much less substantially chilled, by the unavailability of a mistake of age defense in § 2251(a).[9]

Because the government interest at stake is significant and § 2251(a) does not substantially chill protected speech (especially relative to the statute's plainly legitimate sweep), we decline to engraft onto it a reasonable mistake of age defense that is neither grounded in the statutory text nor mandated by the Constitution.

B.

Malloy also argues that his constitutional due process rights were violated because an "accused criminal has a fundamental due process right to present a defense." Petr.'s Br. at 12. We review a properly preserved constitutional claim do novo. *United States v. Hall*, 551 F.3d 257, 266 (4th Cir. 2009).

Contrary to Malloy's assertion, the record before us indicates that he was afforded ample opportunity to

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[9] As the Supreme Court noted in *X-Citement Video*, "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age," and the opportunity for a reasonable mistake of age is extremely low when there is such direct contact. 513 U.S. at 72 n.2.

defend himself. For instance, as we have noted, he was able to present evidence intended to undermine the government's claim that S.G. was a minor. *See supra* note 1. As a constitutional challenge, Malloy's argument therefore fails.

While Malloy's argument is couched in terms of his due process right to defend himself, the crux of his complaint is that he was not allowed to present a particular defense. As such, it is better framed as an evidentiary argument. We review a district court's refusal to admit defense evidence under an abuse of discretion standard. *United States v. Uzenski*, 434 F.3d 690, 708-09 (4th Cir. 2006). "A trial court abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion or relies on erroneous factual or legal premises." *Id.* at 709 (quotations and citation omitted).

Malloy's argument is without merit because "a defendant's right to present a defense is not absolute: criminal defendants do not have a right to present evidence that the district court, in its discretion, deems irrelevant or immaterial." *United States v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003); *see also United States v. Etheredge*, 254 F. App'x 969, 970 (4th Cir. 2007) (affirming a district court's refusal to allow evidence despite the defendant's argument that it "hindered his ability to present a defense"). In *Prince-Oyibo*, for example, the defendant argued that his fear of religious persecution was an important part of his defense. 320 F.3d at 501. This court, however, held that "the district court was within its discretion in excluding the evidence of persecution as irrelevant" to

whether Prince-Oyibo intended to use an altered visa to enter the United States. *Id.* at 502. Here, the evidence that Malloy wished to present in his defense was irrelevant to the crime charged and, therefore, it was properly excluded by the district court.[10] Evidence of a particular type of defense—here, reasonable mistake of age—can be properly excluded by the court without infringing on the general right of a defendant to present a defense.

III.

Malloy next argues that the government and district court constructively amended his indictment. The indictment charged that Malloy

> did *knowingly* employ, use, entice and coerce a minor female to engage in sexually explicit conduct, to wit, graphic sexual intercourse, for the purpose of producing a visual depiction of such conduct, and said depiction was produced using materials that have been mailed, shipped, and transported in interstate and foreign commerce by any means.

J.A. 10 (emphasis added). Malloy argues that since the government was not required to prove that he *knew* the age of S.G. and the jury instructions stated that he was not so required, the government's burden was impermissibly lowered, constructively amending

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[10] As noted, the Supreme Court analogized § 2251(a) to statutory rape laws—*see X-Citement Video*, 513 U.S. at 72 n.2—under which no reasonable mistake of age defense has traditionally been permitted, despite a defendant's general right to present a defense.

his indictment. This court reviews de novo a claim of constructive amendment to an indictment. *See United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994).

A constructive amendment occurs where "the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999). When the government, through its presentation of evidence or its argument, or the district court, through its instructions to the jury, or both, broadens the bases for convictions beyond those charged in the indictment, a constructive amendment—sometimes referred to as a fatal variance—occurs. *See United States v. Redd*, 161 F.3d 793, 795 (4th Cir. 1998). Not all differences between an indictment and the proof offered at trial or the jury instructions rise to the "fatal" level of a constructive amendment. *See Randall*, 171 F.3d at 203. When different evidence or jury instructions are presented at trial but do not alter the crime charged in the indictment, a mere variance occurs. *Id.* "A mere variance does not violate a defendant's constitutional rights unless it prejudices the defendant either by surprising him at trial and hindering the preparation of his defense, or by exposing him to the danger of a second prosecution for the same offense." *Id.* If the "indictment provides the defendant with adequate notice of the charges against him and is sufficient to allow the defendant to plead it as a bar to subsequent prosecutions, a variance in proof at trial will not prejudice the defendant." *Redd*, 161 F.3d at 795-96.

Malloy claims that the indictment against him

was constructively amended because the indictment included the word "knowingly" even though the elements of the offense charged in the indictment do not contain a knowledge element. He argues that, despite the inclusion of the word "knowingly," the government was not required to prove that his actions were "knowing" in order to obtain a conviction; he was prevented from showing that his actions were not "knowing" (i.e., he could not raise the reasonable mistake of age defense); and the jury was instructed that what Malloy knew or believed about S.G.'s age was irrelevant. Petr.'s Br. at 20; J.A. 321-31, 367.

This argument is unavailing. For the variance to be fatal, Malloy must show that it prejudiced his defense. The record reveals an absence of prejudice here. Approximately two months before trial, the government filed a motion in limine that set forth the language of § 2251(a) as well as the voluminous case law supporting the proposition that "knowingly" is not an element of the charge and that the government did not have to prove that Malloy knew that S.G. was a minor. Indeed, Malloy filed a responsive brief—again, well before trial— in which he agreed with the government that it did not have to put on any proof with respect to Malloy's knowledge of S.G.'s age. As such, Malloy cannot reasonably claim that the word "knowingly" in the indictment resulted in actual prejudice. Nor, given the pre-trial pleadings, can he claim that he was convicted of a "distinct, unindicted offense" from that set forth in the indictment. *Floresca*, 38 F.3d at 710. Malloy has shown no danger that he will be exposed to possible re-prosecution on the § 2251(a) charge in the future. He was made aware of the language of the statute under which he

was charged far in advance of trial.[11]

Here, the crime charged in the indictment—the sexual exploitation of S.G. for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a) was the charge on which Malloy was tried. There was no surprise, no hindrance in trial preparation, and no prejudice. Malloy knew that the word "knowingly" was not in the statute, and he knew that no knowledge element was included in the standard jury instructions. Malloy suffered no prejudice; he was not convicted of a distinct, unindicted offense; and there is no danger that he will be re-prosecuted for the same offense. Consequently, there was no constructive amendment.

IV.

Malloy next argues that § 2251(a) as applied to his case exceeds Congress's authority under the Commerce Clause. We review de novo a challenge to the constitutionality of a federal statute. *United States v. Buculei*, 262 F.3d 322, 327 (4th Cir. 2001).

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[11] Although not controlling, we note that the Eleventh Circuit addressed this issue as well in *Deverso*, 518 F.3d 1250. There the defendant was convicted under a different subsection of the same general statute at issue in this case, § 2251, and the indictment also contained the word "knowingly." 518 F.3d at 1258 n.2. The Eleventh Circuit concluded that there was no constructive amendment and found "that the Government's inclusion of the word 'knowingly' in the indictment was mere surplusage. Congress defines the elements of an offense, not the charging document. Surplusage in an indictment may be deleted without any legal error." *Id.* (citation omitted).

In *United States v. Forrest*, this court upheld a defendant's convictions for production and possession of child pornography which itself had never crossed state lines, but which was produced using cameras that were manufactured outside the state. 429 F.3d 73, 78-79 (4th Cir. 2005). In doing so, we cited the Supreme Court's holding in *Gonzales v. Raich*, 545 U.S. 1 (2005), which "reaffirmed the long-standing principle that the Commerce Clause empowers Congress to regulate purely local intrastate activities so long as they are part of an 'economic class of activities that have a substantial effect on interstate commerce.'" *Forrest*, 429 F.3d at 78 (citing *Raich*, 545 U.S. at 16). This court held that "[b]ecause Congress possessed a rational basis for concluding that the local production and possession of child pornography substantially affect interstate commerce, 'the de minimis character of individual instances arising under the statute is of no consequence.'" *Forrest*, 429 F.3d at 79 (citing *Raich*, 545 U.S. at 17).

Our sister circuits to have considered such a Commerce Clause challenge in light of *Raich* have similarly upheld the constitutionality of federal child pornography statutes in cases of purely intrastate possession or production. *See, e.g., United States v. McCalla*, 545 F.3d 750, 755 (9th Cir. 2008) ("Given Congress's broad interest in preventing sexual exploitation of children, it is eminently rational that Congress would seek to regulate intrastate production of pornography even where there is no evidence that it was created for commercial purposes."); *United States v. Blum*, 534 F.3d 608, 609, 611 (7th Cir. 2008) (holding that a conviction under § 2251(a) for the local production of child pornography does not exceed

Congress's Commerce Clause authority and noting that "Congress in enacting [§ 2251] recognized the danger posed by any child pornography regardless of origin"); *United States v. Sullivan*, 451 F.3d 884, 890-92 (D.C. Cir. 2006) (holding that the application of § 2252A to the intrastate possession of child pornography does not exceed Congress's Commerce Clause authority); *United States v. Maxwell*, 446 F.3d 1210, 1218 (11th Cir. 2006) ("[I]t is within Congress's authority to regulate all intrastate possession of child pornography."); *United States v. Chambers*, 441 F.3d 438, 454-55 (6th Cir. 2006) (holding that a conviction for possession of child pornography in Kentucky, where the Polaroid film which was used to produce the images was manufactured out of state, does not exceed Congress's Commerce Clause authority); *United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1272-73 (10th Cir. 2005) (holding that a conviction under § 2251(a) for local production of child pornography when the materials used to produce the contraband had traveled in interstate commerce does not exceed Congress's Commerce Clause authority).

Despite this well-settled federal law, Malloy argues that because he allegedly did not know that he was producing child pornography at the time he videotaped himself and his friend having sex with 14 year-old S.G., "he was neither a consumer nor supplier of child pornography" and therefore his production of child pornography had a "null effect" on the "national market for child pornography." Petr.'s Br. at 28. But

that is not the test.[12] This court need not examine the specific effect on commerce of this defendant's child pornography activities.[13]

Here, there was unquestionably "local" production of child pornography with a video camera and videotape that had traveled in foreign commerce. Congress has concluded, and this court has upheld Congress's conclusion, that such production is "part of an 'economic class of activities that have a substantial effect on interstate commerce.'" *Forrest*, 429 F.3d at 78 (citing *Raich*, 545 U.S. at 16). Malloy's claim that his conduct was "unknowing" does not alter this result: the test is not whether the defendant knew he was engaging in an "economic class of activities that have a substantial effect on interstate commerce," but whether he in fact was. *Forrest*, 429 F.3d at 78. Consequently, we hold that § 2251(a) as applied to Malloy was a valid exercise of Congress's Commerce Clause power.

V.

Finally, Malloy challenges the 15-year sentence imposed by the district court pursuant to the statutory

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[12] We note, as well, that this construction is merely an attempt by Malloy to hang his reasonable mistake of age defense on another constitutional hook.

[13] Again, as we noted in *Forrest*, "[b]ecause Congress possessed a rational basis for concluding that the local production and possession of child pornography substantially affect interstate commerce, *'the de minimis character of individual instances arising under the statute is of no consequence.*'" 429 F.3d at 79 (citing *Raich*, 545 U.S. at 17) (emphasis added).

mandatory minimum under 18 U.S.C. § 2251(e) as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Again, claims of constitutional error are reviewed de novo. *United States v. Myers*, 280 F.3d 407, 416 (4th Cir. 2002).

This court has held that "proportionality review [under the Eighth Amendment's cruel and unusual punishment clause] is not available for any sentence less than life imprisonment without the possibility of parole." *United States v. Ming Hong*, 242 F.3d 528, 532 (4th Cir. 2001). As Malloy recognized at oral argument, because he received less than life without parole, proportionality review is not available under our precedent.[14]

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[14] Even if proportionality review were available, however, it likely would not change the result here. The Supreme Court has explained that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991). The imposition of Malloy's 15-year sentence was for the very serious offense of sexual exploitation of a minor, and it is a result mandated by Congress. Our sister circuits to have considered the issue have also rejected the Eighth Amendment challenge to § 2251. *See United States v. Higgins*, No. 08-13872, 2009 WL 212078 (11th Cir. Jan. 30, 2009) (unpublished); *United States v. Davis*, No. 08-30154, 2009 WL 33631 (5th Cir. Jan. 7, 2009) (unpublished); *United States v. Polk*, 546 F.3d 74, 74-78 (1st Cir. 2008).

VI.

For the aforementioned reasons, Malloy's conviction and sentence are

AFFIRMED.

APPENDIX B

United States District Court
District of Maryland

~~**JUDGMENT IN A CRIMINAL CASE**~~
(For Offenses Committed on or After November 1, 1987)

UNITED STATES OF AMERICA

V.

MICHAEL MALLOY

Case Number :AW-06-0574
USM Number: 39562-037
Defendant's Attorney: Kenneth Ravenell

Assistant U.S. Attorney: Michele Satori

THE DEFENDANT:
☐ pleaded guilty to count (s)_____
☐ pleaded nolo contendere to count (s)_____, which was accepted by the court.
■ was found guilty on count (1) of the Indictment after a plea of not guilty.

Title & Section: Title 18, U.S. Code, Section 2241 (a)

Nature of Offense: Sexual Exploitation of a Minor

Date Offense Concluded: July, 2006

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Count Number(s): 1

The Defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by U.S. v. Booker, 125 S.Ct 738 (2005).

☐ The defendant has been found not guilty on Counts_____
☐ Count (s)_____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

January 9, 2008

Date of imposition of Judgment

/s/ 1/9/08
Alexander William, Jr. Date

Name of Court Reporter: Tracy Dunlap
301-344-3912

DEFENDANT: Michael Malloy Case Number: AW-06- 0574

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of (180) One hundred and eighty months. The defendant is entitled to credit for time served commencing September 20, 2007.

■ The court makes the following recommendations to the Bureau of Prisons:

That the inmate be placed in a facility consistent with his security level that is as close as possible to his family setting (Washington, DC).

■ The defendant is remanded to the custody of United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at _____a.m./p.m. on_____.
☐ as notified by the United States Marshal.

☐ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal.

☐ before 2 p.m. on _____.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. § 3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. § 3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. § 3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on_____to_____at_____ _____, with a certified copy if this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY U.S. MARSHAL

DEFENDANT: Michael Malloy Case Number: AW-06- 0574

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of (5) Five

years.

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

A. STATUTORY CONDITIONS OF SUPERVISED RELEASE

1) The defendant shall not commit any federal, state or local crime.
2) In any felony case, the defendant shall not possess a firearm or ammunition as defined in 18 U.S.C. § 921.
3) The defendant shall not illegally use or possess a controlled substance.
4) The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

5) Pursuant to Pub. Law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, if applicable, the defendant shall cooperate in the collection of DNA while incarcerated in the Bureau of Prisons, or as directed by the probation officer.
6) If this judgment imposes any criminal monetary

penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Scheduled Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

B. STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report with the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependants and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer

ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where ~~controlled substances~~ are illegally sold, used, distributed or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted the permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within 72 of being arrested or questioned by a law enforcement officer;

12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;

13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

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DEFENDANT: Michael Malloy Case Number: AW-06-0574

C. SUPERVISED RELEASE ADDITIONAL CONDITIONS

1 The defendant shall satisfactorily participate in a mental health treatment program approved by the probation officer, which may include evaluation, counseling, and testing as deemed necessary by the probation officer.

2. The defendant shall register with the State sex offender registration agency in any state where the defendant resides, is employed, carries on a vacation, or is a student as directed by the probation officer. The probation officer shall provide the state officials with any and all information required by the state sex offender registration agency, and may direct the defendant to report to that agency in person for additional processing, such as photographing and fingerprinting.

3. The defendant shall pay a special assessment fee in the amount of $100.00 immediately.

DEFENDANT: Michael Malloy Case Number: AW-06-0574

CRIMINAL MONETARY PENALTIES

The Defendant must pay the total monetary penalties under the scheduled of payments on Sheet 5B.

Assessment	Fine	Restitution

TOTALS $100.00 $ $
☐ CVB Processing Fee $25.00

☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee Total Loss*:
Restitution Ordered:
Priority or Percentage:

TOTALS $_____0 $_____0

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgement, pursuant to 18 U.S. C.§3612(f). All of the payment option on Sheet 6 may be subject to penalties for delinquency and default, pursuant

to 18 U.S.C.§3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

---

*Findings for the total amount of losses are required under Chapter 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Michael Malloy Case Number: AW-06-0574

SCHEDULED PAYMENT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost or prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ■ A special Assessment Fee in the amount of $100.00 in full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D,or E); or

C ☐ Not later than _____; or

D ☐ Installments to commence _____ day (s)

after the date of this judgment.

E ☐ In _____ (*e.g. equal weekly, monthly, quarterly*) installments of $____over a period of _____year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if the judgement imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installment during the term of supervision; or

☐ on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instruction regarding the payment of criminal monetary penalties:
☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number) Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

☐ The Defendant shall pay the cost of prosecution.

☐ The Defendant shall pay the following court cost(s):

☐ The Defendant shall forfeit the defendant's interest in the following property to the United States:

APPENDIX C

FILED: August 4, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4136
(8:06-CR-00574-aw-1)

UNITED STATES OF AMERICA,
Plaintiff- Appellee

v

MICHAEL MALLOY,
Defendant-Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Chief District Judge Conrad, and Judge Schroeder.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

Section 2251 of Title 18 of the United States Code provides:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose

of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct:

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign

commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(c) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

Supreme Court, U.S.
FILED
JAN 2[illegible] 2010
OFFICE OF THE CLERK

No. 09-523

In the Supreme Court of the United States

MICHAEL MALLOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
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QUESTION PRESENTED

Whether 18 U.S.C. 2251(a), which criminalizes the production of child pornography, is unconstitutional under the First Amendment unless it is construed to include a reasonable-mistake-of-age affirmative defense.

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In the Supreme Court of the United States

No. 09-523

MICHAEL MALLOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 568 F.3d 166.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2009. A petition for rehearing was denied on August 4, 2009 (Pet. App. 42a). The petition for a writ of certiorari was filed on October 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of using a minor to create child pornography, in violation of 18 U.S.C. 2251(a). Pet. App. 1a-2a. The district court sentenced petitioner to 180 months of impris-

onment, to be followed by five years of supervised release. *Id.* at 32a-34a. The court of appeals affirmed. *Id.* at 6a.

1. In October 2005, petitioner's friend, Aaron Burroughs, brought a 14 year-old girl (S.G.) to petitioner's home to have sex with them, and the men videotaped the sexual encounter. At that time, petitioner was a 33 year-old United States Capitol Police Officer; Burroughs was the coach of a junior varsity high school football team; and S.G. was a sophomore in high school and manager of that football team. Later in 2005, Burroughs again brought S.G. to petitioner's home to have sex with the two men. At the time of this second encounter, petitioner was either 14-years-old or may have just turned 15. Pet. App. 2a-3a.

In the summer of 2006, Federal Bureau of Investigation (FBI) agents opened an investigation and interviewed petitioner. Pet. App. 3a. Petitioner admitted that he had sex with the girl on two occasions and that he had videotaped the first encounter with his Sony camcorder. *Ibid.* Petitioner also admitted that he thought the girl "looked young" when he first met her. *Ibid.* (quoting C.A. App. 60). During a warrant-authorized search of his residence, FBI agents recovered the camera and the videotape. *Ibid.* The tape depicted petitioner and Burroughs having sex with S.G., and "end[ed] with [petitioner] ejaculating onto the face and into the mouth of the victim." Gov't C.A. Br. 4 (quoting C.A. App. 255) (first brackets in original).

2. A federal grand jury returned an indictment charging petitioner with sexual exploitation of a minor for the purpose of producing a visual depiction, in viola-

tion of 18 U.S.C. 2251(a).[1] Pet. App. 3a. In pertinent part, Section 2251(a) punishes "[a]ny person who * * * uses * * * any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if that visual depiction was produced using materials that have been * * * transported in interstate or foreign commerce." 18 U.S.C. 2251(a). Section 2256(1) defines a "minor" as "any person under the age of eighteen years." 18 U.S.C. 2256(1).

Before trial, the government filed a motion in limine to preclude petitioner from offering a reasonable-mistake-of-age defense. Pet. App. 4a. The district court granted the motion, reasoning that Section 2251(a) resembles "statutory rape" cases where most jurisdictions "simply will not allow reasonable mistake-of-fact defenses." *Ibid.* (quoting C.A. App. 111). The court nevertheless gave petitioner an opportunity to "proffer the circumstances that reflect[] high care, high standard, almost a faultless situation where there's no way that your client was able to determine that she was under 18." *Id.* at 4a n.1 (quoting C.A. App. 110). After hearing petitioner's evidence, the court held that he failed to make any "proffer that [petitioner] investigated [the victim's] age or saw any documents that she provided that showed that she was over 18" and, accordingly, the court adhered to its original ruling. *Id.* at 4a-5a n.1 (quoting C.A. App. 154).

At trial, the government established that the victim was born in November 1990, and thus was 14-years-old when the videotape was produced, and also that the

[1] Petitioner was also charged with one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B), but that count was later dropped. Gov't C.A. Br. 2.

video camera and cassette had been transported in foreign commerce. Pet. App. 5a-6a. Petitioner stipulated that the videotape was "a visual depiction showing [petitioner] engaging in genital and oral sexual intercourse with [the victim]," and that it "proves beyond a reasonable doubt that [petitioner] used [the victim] to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." *Id.* at 5a (quoting C.A. App. 185, 403). Petitioner, however, testified that he was told S.G. was 19-years-old and a sophomore at Bowie State. Gov't C.A. Br. 3, 22 n.9.

The jury was instructed that

> [t]he government does not have to prove that the defendant knew that [the victim] was less than 18 years old and it is not a defense to the charge whether or not the defendant knew or believed that [she] was a minor. What the defendant may have known or believed with respect to [her] age is irrelevant. [Her] actual age is determinative for purposes of the government meeting its burden of proof on this element.

C.A. App. 367. On September 20, 2007, the jury found petitioner guilty. Pet. App. 6a.

The advisory Sentencing Guidelines range was 324 to 360 months of imprisonment. Pet. App. 6a. The district court sentenced petitioner to the statutory mandatory minimum of 15 years. *Ibid*; see 18 U.S.C. 2251(e).

3. The court of appeals affirmed. Pet. App. 1a-29a. As relevant here, the court rejected petitioner's argument that a reasonable-mistake-of-age defense is constitutionally required. *Id.* at 7a-19a.[2]

---

[2] The court of appeals also rejected petitioner's other arguments, Pet. App. 19a-28a, including his claim that precluding him from raising

The court first looked to the statutory text, legislative history, and relevant judicial decisions, and concluded "that knowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense." Pet. App. 7a. The court explained that the statute contains no "knowledge" requirement on its face; the legislative history reveals that Congress "considered and explicitly rejected such a knowledge requirement"; and this Court opined that "knowledge of the age of the victim is not required to convict a defendant under § 2251(a)." *Id.* at 8a (citing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) (*X-Citement Video*)).

Turning to the First Amendment challenge, the court rejected petitioner's argument that a reasonable-mistake-of-age defense must nevertheless be "judicially engrafted" to avoid "chilling a substantial amount of protected speech." Pet. App. 10a. Recognizing "the strong government interest identified by [this] Court in suppressing the production of child pornography," the court of appeals examined whether "§ 2251(a) as written," *i.e.*, without a reasonable-mistake-of-age defense, "poses a threat of chilling a substantial amount of protected expressive activity." *Id.* at 16a-17a.

The court held that no substantial chill would occur for several reasons. First, the court observed that, "as a practical matter," "little legitimate [*i.e.*, adult, but non-obscene] pornography would be chilled because producers of pornography are *already* required to authenticate actors' ages." Pet. App. 17a (citing 18 U.S.C. 2257(b)(1)). And producers, the court explained, have a

---

a reasonable-mistake-of-age defense violated his due process rights, *id.* at 19a-21a.

"superior ability * * * to ascertain the age of the subject—through visual contact, documentary verification, direct questioning, and reputational information." *Id.* at 19a. Second, the court noted that "only a subset of adult pornography is at issue—namely, pornography made by producers who seek to use 'youthful-looking' actors or actresses." *Id.* at 17a. The court added that "because the children depicted in child pornography frequently cannot be found, the prosecutor must show that the subject is a minor solely from the pictures," which means that "most prosecutions for child pornography involve a subject that is not simply 'youthful- looking' but unmistakably a child." *Id.* at 17a-18a. Third, the court reasoned that "producers of adult pornography who wish to use youthful-looking subjects will not be deterred by § 2251(a) for profit reasons." *Id.* at 18a. The court concluded that it was therefore "unlikely that producers of such pornography will be chilled, much less substantially chilled, by the unavailability of a mistake of age defense in § 2251(a)" and, thus, "decline[d] to engraft onto it a reasonable mistake of age defense that is neither grounded in the statutory text nor mandated by the Constitution." *Id.* at 19a.

In so holding, the court of appeals aligned itself with two other courts of appeals, *United States* v. *Deverso*, 518 F.3d 1250 (11th Cir. 2008), and *Gilmour* v. *Rogerson*, 117 F.3d 368 (8th Cir. 1997), cert. denied, 522 U.S. 1122 (1998), which had already held that "no mistake of age defense is necessary in statutes prohibiting the production of child pornography." Pet. App. 12a; see *id.* at 12a-14a. The court recognized that a divided Ninth Circuit panel had held otherwise before this Court decided *X-Citement Video*, but noted that even in the Ninth Circuit the defense is "very narrow" and likely unavailable

to petitioner who "did not conduct any investigation or view any documentary evidence" about the victim's age. *Id.* at 12a n.2 (citing *United States* v. *United States Dist. Ct.*, 858 F.2d 534 (1988)).

ARGUMENT

Petitioner argues (Pet. 7-9, 10-13) that the First Amendment requires courts to engraft a reasonable-mistake-of-age defense onto 18 U.S.C. 2251(a) and that the decision below conflicts with a decision of the Ninth Circuit. The court of appeals decision is correct, and no conflict warranting this Court's review exists. The Ninth Circuit decision was issued before *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), made clear that no reasonable-mistake-of-age defense is required. Every circuit to have considered this issue since *X-Citement Video* has rejected petitioner's argument, and petitioner could not prevail even under the Ninth Circuit's narrow reasonable-mistake-of-age standard. The Court recently denied certiorari on this issue. See *Wilson* v. *United States*, cert. denied, No. 09-6491 (Jan. 11, 2010). The same result is warranted here.

1. Section 2251(a) criminalizes the production of child pornography in interstate commerce. It applies to "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if that visual depiction was produced using materials that have been * * * transported in interstate or foreign commerce." 18 U.S.C. 2251(a). As petitioner concedes (Pet. 12), the statute does not contain an express affirmative defense for a reasonable mistake as to the victim's age. And, as this Court observed, Congress intended to hold produc-

ers of child pornography criminally liable even in the absence of evidence that they knew the age of their victims, so long as the victims were actually children. See *X-Citement Video*, 513 U.S. at 74-77.

Petitioner nevertheless contends (Pet. 7, 10-13) that the First Amendment requires that a defense of reasonable mistake of age be made available to defendants under Section 2251(a). He is mistaken.

As the court of appeals explained (Pet. App. 8a-9a), *X-Citement Video* distinguished between distribution and production of child pornography, explaining that "producers may be convicted under § 2251(a) without proof they had knowledge of age." 513 U.S. at 76 n.5; see *id.* at 72 n.2. The Court compared a Section 2251 offense to statutory rape, observing that with both offenses "the victim's actual age [i]s determinative despite defendant's reasonable belief that the girl had reached age of consent." *Ibid.* (citation omitted). The Court also explained that it "makes sense to impose the risk of error on producers" because, as compared to distributors or mere possessors of child pornography, they "are more conveniently able to ascertain the age of performers." *Id.* at 76 n.5.

Section 2251(a) reaches only depictions of real children engaging in sexually explicit conduct, which lack First Amendment protection. See 18 U.S.C. 2251(a); *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). The statute does not apply to pornographic material with youthful-looking adult actors or to virtual child pornography. Cf. *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 250-251 (2002) (invalidating statute criminalizing production of virtual child pornography). Indeed, petitioner has not identified *any* application of Section 2251(a) that would reach constitutionally protected expression. Be-

cause Section 2251(a) reaches only unprotected speech, it is not overbroad. See, *e.g.*, *United States* v. *Johnson*, 376 F.3d 689, 695-696 (7th Cir. 2004) (rejecting overbreadth challenge to Section 2251 because the statute reaches only unprotected speech).

But even if a statute reaching only unprotected speech could be subject to challenge because of its chilling effect on protected speech, which appears to be the crux of petitioner's argument (Pet. 10-13), he is mistaken in contending that Section 2251(a) substantially chills producers of adult pornography. As the court of appeals explained (Pet. App. 17a), the only material potentially affected by Section 2251(a) is the subset of pornography involving youthful-looking adult actors. And, within that already limited scope, most prosecutions "involve a subject that is not simply 'youthful-looking' but unmistakably a child." *Id.* at 17a-18a. That is so because prosecutors need to prove that the actor is a minor and, often, the children depicted cannot be found. *Ibid.*

The relative ease with which pornography producers can verify their subjects' ages, see *X-Citement Video*, 513 U.S. at 76 n.5, suggests that Section 2251(a) will not deter production of otherwise-lawful pornography involving youthful-looking adults so much as encourage producers of such material to verify their subjects' age, as they are already required to do by a separate criminal statute. See Pet. App. 17a (quoting 18 U.S.C. 2257(b)(1), which requires producers to "ascertain, by examination of an identification document containing such information, the performer's name and date of birth"). The First Amendment therefore does not require engrafting a reasonable-mistake-of-age affirmative defense onto 18 U.S.C. 2251(a).

2. Petitioner contends (Pet. 7-9) that there is a conflict among the courts of appeals "as to whether to recognize a reasonable mistake of age defense to a charge under 18 U.S.C. 2251(a)," Pet. 7.[3] On January 11, 2010, this Court denied the petition for a writ of certiorari in *United States* v. *Wilson*, No. 09-6491, which raised the same issue and relied on the same purported conflict. For the same reasons, this Court's review is not warranted here.

Every court of appeals that has addressed the issue since this Court's decision in *X-Citement Video* has held that the First Amendment does not require a reasonable-mistake-of-age defense in Section 2251(a) cases. See *United States* v. *Wilson*, 565 F.3d 1059, 1067-1069 (8th Cir. 2009), cert. denied, No. 09-6491 (Jan. 11, 2010); *United States* v. *Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008); see also *Gilmour* v. *Rogerson*, 117 F.3d 368, 372-373 (8th Cir. 1997) (reaching same conclusion with respect to state statute criminalizing production of child pornography), cert. denied, 522 U.S. 1122 (1998).

Before *X-Citement Video*, the Ninth Circuit had held that Section 2251(a) would be unconstitutional in the absence of a reasonable-mistake-of-age defense. See *United States* v. *United States Dist. Ct.*, 858 F.2d 534,

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[3] Petitioner also contends (Pet. 8-9) that a decision of the Maryland Court of Appeals conflicts with the decision below. That is incorrect. In *Outmezguine* v. *State*, 641 A.2d 870 (Md. 1994), the court held, *as a matter of statutory construction*, that the state legislature intended to provide defendants with a mistake-of age defense to a similarly targeted state statute. *Id.* at 883-884. But it expressly rejected the First Amendment argument urged by petitioner: "[W]e hold that the First Amendment does not require knowledge of the minor's age to be an element of the crime under § 419A(c) [prohibiting production of child pornography], nor does it require a reasonable mistake of age defense." *Id.* at 880.

543-544 (1988). That case involved unique facts: a "massive fraud" on the entire "adult entertainment industry" perpetrated by a 16 year-old minor who was an aspiring adult film actress and her agent, such that even those producers who took "the most elaborate steps to determine how old" their subject was would have been fooled. *Id.* at 536, 540. A divided panel of the court observed that the First Amendment "does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech," and it determined that not allowing a reasonable-mistake-of-age defense under the circumstances would have that effect. *Id.* at 540. The court therefore decided to "engraft" a "very narrow" affirmative defense "onto [the] statute," which would permit a defendant to escape liability if he proved, "by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Id.* at 542-543 (footnote omitted).

The Ninth Circuit's decision relied in significant part on cases involving distributors and possessors of child pornography—as opposed to producers. See *United States Dist. Ct.*, 858 F.2d at 539. Because *X-Citement Video* later explained that producers of child pornography should be treated differently from distributors of such material—specifically stating that "producers may be convicted under § 2251(a) without proof they had knowledge of age," 513 U.S. at 76 n.5—the Ninth Circuit's decision does not create a conflict warranting this Court's review. The Ninth Circuit has not had an opportunity to reassess its position in light of *X-Citement Video* and other courts' decisions that relied on *X-Citement Video* to reject First Amendment challenges to Section 2251(a). The court of appeals should be per-

mitted that opportunity, particularly because it stated that its holding was based on its "reading of the relevant Supreme Court opinions" and was valid "[u]nless and until the Supreme Court speaks otherwise." *United States Dist. Ct.*, 858 F.3d at 540, 542. Review by the Court at this time would be premature.

3. Even if the disagreement in the circuits otherwise warranted this Court's review, this case would not be a suitable vehicle for resolving the conflict because petitioner would not prevail even under the affirmative defense recognized by the Ninth Circuit. The Ninth Circuit adopted a "very narrow" affirmative defense, requiring a defendant to show, by clear and convincing evidence, not only that he "did not know" that the subject was underage, but also that he "could not reasonably have learned" his subject's true age. *United States Dist. Ct.*, 858 F.3d at 543. The court of appeals noted that "[s]uch a defense would be entirely implausible under most circumstances," and should be limited to "rare" cases, such as "where the actress allegedly engaged in a deliberate and successful effort to deceive the entire industry." *Id.* at 542-543.

This not that "rare" case. Here, petitioner was offered the opportunity to "proffer the circumstances that reflect[] high care, high standard, almost a faultless situation where there's no way that your client was able to determine that she was under 18." Pet. App. 4a n.1 (quoting C.A. App. 110). He was unable to do so. Even though petitioner admitted that the 14 year-old girl "looked young," and even though he was a *participant* in the sexual encounters (not solely a "producer"), he did not attempt to verify her age. *Id.* at 3a. When petitioner was purportedly told that the girl was 19-years-old, he did not investigate further and did not see or ask

to see "any documents" showing "she was over 18." *Id.* at 4a-5a n.1 (quoting C.A. App. 154). Petitioner does not, and could not, credibly claim that he "could not reasonably have learned" his victim's true age. *United States Dist. Ct.*, 858 F.3d at 543.

These facts readily distinguish the Ninth Circuit case, where defendants claimed that the child victim provided them with fraudulent "California photographic identification," "other official documents," and evidence that she had already been employed by "men's magazines" and other employers who, "according to industry custom and perception, reliably investigate the age of their models." *United States Dist. Ct.*, 858 F.2d at 540. Because petitioner would not prevail under the Ninth Circuit's pre-*X-Citement Video* standard, further review of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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